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SUPREME COURT, U.S.

NO. 80-1429

IN THE SUPREME COURT OF THE UNITED STATES

DUANE YOUNGBERG, et al.,

Petitioners,

v.

NICHOLAS ROMEO,

Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT NICHOLAS ROMEO

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TABLE OF AUTHORITIES

Page

CASES

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 7

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 7

Herb v. Pitcairn, 324 U.S. 117, 125 (1944) 7

Jackson v. Indiana, 406 U.S. 715 (1972) 1

Kremens v. Bartley, 431 U.S. 119 (1977) 5

O'Connor v. Donaldson, 422 U.S. 563 (1974) 1, 5

Parham v. J.R., 442 U.S. 584 (1979) 3

STATUTES AND REGULATIONS

Pa. Stat. Ann. tit. 50, §4422 6

4 Pa. Code §39.2(a) 6

OTHER SOURCES

Bartlett, F.L.: Institutional Peonage: Our Exploitation of Mental Patients, 214 Atlantic 116 (1964) 6

Solomon, H. The American Psychiatric Association in Relation to American Psychiatry, American Journal of Psychiatry (1958) 6

SUPPLEMENTAL BRIEF OF RESPONDENT NICHOLAS ROMEO

Respondent Nicholas Romeo, pursuant to Rule 22 of the Supreme Court Rules, files this Supplemental Brief in response to the briefs of several amici curiae, which were not available at the time of respondent's last filing.

1. The amici erroneously read the Court of Appeals decision as "a substantial intrusion by the federal courts into medical decisions." (Motion of American Psychiatric Assoc., p.2). Such a contention is at odds with the facts and slurs the substantial distinctions between medical practice generally, and compulsory institutional care.

Nothing contained in the decision of the Court of Appeals is applicable to the physician-patient relationship as that relationship is generally envisioned. Virtually every psychiatrist, doctor and psychologist in this country may continue to engage in private or public practice in providing treatment to consenting patients without thought of the Romeo decision.

However, when states delegate to physicians the power to compel unwilling patients to accept confinement, shackles, and intrusive treatment techniques, physicians adopt a role different than that of a family doctor. Federal and common law restrictions on the power of physicians to treat non-consenting patients have never been thought to be an intrusion on medical decisions. Indeed, this Court has always recognized that there are federal constitutional limitations upon the power to restrict the liberty of patients for the purpose of providing unwanted treatment. See O'Connor v. Donaldson, 422 U.S. 563 (1974); Jackson v. Indiana, 406 U.S. 715 (1972).

Not one of the claims by respondent in this case involve a challenged medical judgment. None of the defendants is a psychiatrist, doctor or psychologist.

With respect to the seventy-seven injuries that Nicholas Romeo received at Pennhurst, respondent's claim was founded upon proferred expert psychological testimony which would have demonstrated that the violence on his ward was a result of the defendants' failure to provide behavioral programs at Pennhurst. (Ap. 98a-99a). The programs sought were not medical in nature, nor was the failure to provide them based on a medical judgment. In fact, no defendant ever contended in this litigation that the failure to provide such treatment was based upon a medical judgment.

Similarly, with respect to shackles, respondent's claim was founded upon the non-medical nature of their use upon Nicholas Romeo. Respondent's expert psychologist was prepared to testify that the use of shackles upon him was not based upon a medical judgment, but rather was for staff convenience. (Ap. 101a).

The non-medical nature of the utilization of long-term restraints upon Nicholas Romeo is clearly established by the facts of this case. No physician at Pennhurst has the power to order that a resident be shackled. Rather, as the Court of Appeals recognized, that decision is reserved under Pennsylvania law to the Superintendent of the facility -- in this case a layman. See Pa. Stat. Ann. tit. 50, §4422. (Ap. 16a, n.25).

It is therefore apparent that respondent's claims of physical abuse and unnecessary restraints do not relate to medical judgments at all. The policy of enforced inactivity of residents at Pennhurst, which inevitably led to the rampant violence on the wards at that facility was not part of any medical judgment. The prohibition

against unnecessary restraints adopted by the Court of Appeals cannot intrude upon medical judgments, since physicians in Pennsylvania have no power to determine that restraints be used.

Finally, the Court of Appeals did not intrude into medical decision-making in holding that treatment must be provided to the institutionalized retarded, when the purpose of confinement was the provision of treatment. The Court below, explicitly stating its deference to the medical profession (Ap. 27a) limited judicial review of the treatment provided to whether the form of treatment had a "coherent relationship" to the patient's needs. (Ap. 38a).

Such a standard permits the courts to ensure that the purpose of the liberty deprivation is carried out, while avoiding judicial intervention into what the Court of Appeals recognized to be a mixed legal/medical issue. (Ap. 27a). By limiting judicial review in the manner utilized by the Court below, courts need not decide if the treatment decision was the most appropriate (Ap. 38a, n.57), but only that a medically based decision was made. Even then, "security concerns, administrative necessities and fiscal constraints" (Ap. 38a) are valid defenses.

Thus the standard adopted by the Court of Appeals does not intrude on medical judgments, but only insures that such judgments are made. Such limited review avoids placing the judiciary in the awkward position of deciding which of several treatment techniques is best. See, e.g., Parham v. J.R., 442 U.S. 584 (1979). Given the limited standard adopted, the Court of Appeals recognized that the judiciary has "the tools to ascertain whether the constitutional minimum of medical acceptability ... is being fulfilled." (Ap. 39a-40a).

2. The amici seriously misread the Court of Appeals decision concerning the utilization of least restrictive principles to this case. For example, the American Psychiatric Association asserts that

> Although the notion of a least restrictive treatment is superficially enticing, the concept in practice may be almost unworkable.

Brief of American Psychiatric Association, at 7, n.5. (emphasis added).

But the Court of Appeals rejected the least restrictive standard for day-to-day treatment decisions in much more definite language:

> ... the application of a constitutional standard of "least intrusive alternative" on continuing treatment programs, which often involve qualitative medical determinations subject to daily, possibly hourly changes, would prove unworkable.

(Ap. 32a)(emphasis added).

Thus the Court of Appeals limited its use of least restrictive principles to extraordinary treatment modalities, such as involuntary sterilization, and prefrontal labotomy. (Ap. 30a, n.44). The principle was rejected by the lower Court in daily medical decisions.

The retention of the least restrictive principle in such rare, intrusive modalities is a wise exercise of judicial discretion. In cases of extremely intrusive medical techniques, decisions concerning the appropriateness of medically-indicated treatments are not simply medical questions. No one would contest that a medically indicated abortion could be appropriately rejected by a patient (or the guardian of an incompetent patient) on religious grounds having nothing to do with medical factors. Permanent physical alterations of the brain, as in prefrontal labotomy, raise similar issues not related to pure medical judgments.

3. Nicholas Romeo is not mentally ill. No resident of Pennhurst is mentally ill. (Ap. 4a, n.1). Respondent has never been treated by a psychiatrist. None of respondent's claims concerning a denial of treatment involve an assertion by him that psychiatric care was needed, or even desirable.

"Careful attention," the Court has written, "must be paid to the differences between the mentally ill and mentally retarded." Kremens v. Bartley, 431 U.S. 119, 135-36 (1977).

As the Court below recognized:

> Mental retardation is an impairment in learning capacity and adaptive behavior, and is not treatable, like mental illness, by means of drugs or psychotherapy.

(Ap. 4a, n.1).

This case is exceedingly complex, involving three constitutional claims concerning the involuntarily institutionalized retarded. Because of the trial court's error, the present record is devoid of expert testimony concerning the application of psychological techniques to the retarded.

In such a context, the review by this Court of the position of the American Psychiatric Association, whose expertise is of no use to the retarded, could be misleading and would be unfair to respondent. This case should not be decided with reference to "the baffling field of psychiatry." O'Connor v. Donaldson, supra, 442 U.S. at 578 n.2 (concurring opinion). Accordingly, the Motion of the American Psychiatric Association for Leave to File as Amicus Curiae should be denied.

4. The amici contend that the potentiality for liability created as a result of the decision of the Court of Appeals will make it difficult for states to attract competent staff to their facilities. This is so, it is argued, because staff can be held liable under the Romeo standard for conditions that they cannot change.

The states, having constructed isolated facilities, systematically underfunded them, and paid uncompetitive salaries, cannot place the blame for their inevitable staffing problems upon the Court of Appeals.

Well before this case was filed, the Director of Information for the Joint Commission on Mental Illness had commented that "Physicians who fancy themselves as medically respectable have tended to shun these places." See Bartlett, F.L. Institutional Peonage: Our Exploitation of Mental Patients, 214 Atlantic 116 (1954).

The reason, of course, was not due to potential liability, but because of the abject failure of the amici in funding institutions. As the President of the American Psychiatric Association wrote in 1958:

> I do not see how any reasonably objective view of our mental hospitals today can fail to conclude that they are bankrupt beyond remedy.

Solomon, H. The American Psychiatric Association in Relation to American Psychiatry, American Journal of Psychiatry (1958) at 115.

The disasterous conditions prevelent at Pennhurst will prevent the attraction of quality staff, no matter what the state of the federal law is concerning staff liability. Doctors do not decide where they will practice by perusing advance sheets.

Contrary to the assertion of the American Psychiatric Association, this case does not present "questions regarding the imposition of liability without fault for constitutional torts." (Brief of the American Psychiatric Association, at 12). The Court of Appeals decision addresses questions concerning the rights of the retarded in an institutional context.[1]

The Court below never addressed the question of whether a particular defendant may be liable for a constitutional violation beyond his control. The proposed solutions of the American Psychiatric Association, involving a restructuring of the good faith defense, were not considered by the Court of Appeals, much less rejected.

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[1] Pennsylvania law indemnified defendants in cases such as this from personal liability. See 4 Pa. Code §39.2(a).

There is no good reason to grant the petition for certiorari on considerations not reached or presented below.

5. Several amici contend that a speedy resolution of the constitutional claims involved herein would assist them in planning their budgets, and help lower courts in deciding numerous similar cases pending below. Such factors are present in virtually all certiorari petitions.

But haste to resolve difficult constitutional questions does not facilitate wise adjudication, particularly here, where only a remand has been ordered, and the record is devoid of expert testimony which would be so useful to the Court in making its decision.

There is no need for speed in seeking to determine these questions. The instant case is non-final, with no finding of liability. Indeed, this Court does not generally review non-final decisions. See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916)(lack of finality "of itself alone furnished sufficient ground for the denial..."); Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967)("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). This Court's power is to "correct wrong judgments, not to revise opinions." Herb v. Pitcairn, 324 U.S. 117, 125 (1944).

Since, as the amici conceed, numerous other cases are pending below which raise the same issues as this one, this Court will have numerous opportunities to review a final judgment which contains a record worthy of this Court's analysis. In the interim, alternative formulations of the rights involved may be adopted by other Circuit Courts, giving this Court the benefit of additional available options.

Alternatively, the Courts of Appeal may arrive at a concensus on their own on the rights in question thus obviating the need for review by this Court.

The petition for certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE AND FILING

EDMOND A. TIRYAK, Counsel for Respondent herein, being duly sworn, deposes and says that, on the below date he placed copies of Respondent's Supplemental Brief, postage prepaid, into the United States mail, addressed to the Clerk of this Court, and to the counsel listed on the pages attached hereto.

I certify that all persons who should have been served, have been served.

DATED: 5/8/81

Edmond A. Tiryak
EDMOND A. TIRYAK

Sworn to and subscribed
before me this 8th day
of May, 1981.

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Notary Public

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My Commission Expires July 2, 1986

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